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7
8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10
11 LYCURGAN, INC. d/b/a ARES
ARMOR,

12 Plaintiff,

13 v.

14 B. TODD JONES, in his official
capacity as Head of the San Diego
Bureau of Alcohol, Tobacco,
15 Firearms and Explosives; and
DOES 1-10,

16 Defendants.

CASE NO. 14-CV-1679 JLS (BGS)

**PLAINTIFF LYCURGAN, INC.'S NOTICE
OF MOTION AND MOTION FOR NEW
TRIAL PURSUANT TO FEDERAL RULE
OF CIVIL PROCEDURE 59(a)**

Judge: Hon. Janis L. Sammartino
Dept.: 4A
Date: March 5, 2015
Time: 1:30 p.m.

17
18 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

19 PLEASE TAKE NOTICE THAT on March 5, 2015 at 1:30p.m., in Department
20 4A of the above-entitled court located at 221 West Broadway, San Diego, California
21 92101, Plaintiff Lycurgan, Inc. ("Lycurgan") will and hereby does move the Court to
22 grant a new trial in the above-captioned case based on newly discovered evidence
23 pursuant to Federal Rule of Civil Procedure 59(a).

24 Defendant United States ("Government") seized from Lycurgan 5,804 unfinished
25 polymer lower receivers for civil forfeiture under 18 U.S.C. section 983. After Lycurgan
26 spent great time and expense in its efforts to retrieve its property, the Government
27 recently offered to return all of the seized 5,804 items. However, the Government
28 returned only 5,786, leaving Lycurgan short by 18.

Lycurgan requested the Government to release the remaining 18 unfinished polymer lower receivers in accordance with 18 U.S.C. section 983(f)(2). The Government has not complied with this request. Therefore, Lycurgan seeks to file a petition in this Court for the release of its seized property pursuant to section 983(f)(3). This Court has jurisdiction of the petition under section 983(f)(3)(A).

This motion is based on this notice of motion, the below memorandum of points and authorities, the Declaration of Scott A. McMillan and exhibits attached thereto, the pleadings, records and papers filed in this case, and any additional evidence that may be submitted at the hearing on this motion.

Respectfully submitted,
THE McMILLAN LAW FIRM, APC
/s/ Michelle D. Volk

Dated: January 14, 2015

Michelle D. Volk
Attorneys for Petitioner/Movant
Lycurgan, Inc.

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TABLE OF AUTHORITIES

Federal Statutory Authority

18 U.S.C. § 983 2, 3, 5, 7

Federal Rules

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Federal Rules of Civil Procedure, rule 59. 4, 5

Federal Rules of Civil Procedure, rule 60. 5

Federal Decisional Authority

Auster Oil & Gas, Inc. v. Stream (5th Cir. 1985) 764 F.2d 381. 6

Brown v. Wright (9th Cir. 1978) 588 F.2d 708. 4

Deas v. Paccar, Inc. (11th Cir. 1985) 775 F.2d 1498. 4

Dixon v. Wallowa County (9th Cir. 2003) 336 F.3d 1013. 5

Edwards v. Occidental Chemical Corp. (9th Cir. 1990) 892 F.2d 1442. 6

Eminence Capital, LLC v. Aspeon, Inc. (9th Cir. 2003) 316 F.3d 1048. 6

Foman v. Davis (1962) 371 U.S. 178. 6

Martinez v. Newport Beach City (9th Cir. 1997) 125 F.3d 777. 6

Silver Sage Partners, Ltd. v. City of Desert Hot Springs (9th Cir. 2001) 251 F.3d 814. . 4

Uganda Knapps v. City of Oakland (N.D. Cal. 2009) 647 F.Supp.2d 1129. 4

Wada v. United States Secret Service (D.C. 2007) 525 F.Supp.2d 1. 5

1 **I. INTRODUCTION**

2 Defendant United States (“Government”) “recently determined that the EP-80
3 lower firearm receivers seized [on March 15, 2014] are no longer needed as evidence in
4 its criminal investigation.” [McMillan Decl. ¶ 10, Ex. A.] The ATF seized Lycurgan’s
5 property pursuant to a search warrant for the purpose of civil forfeiture. After several
6 months, and in response to Lycurgan’s efforts to obtain the search warrant affidavit to
7 use in challenging the civil forfeiture proceeding, the Government dismissed the civil
8 forfeiture. Nevertheless, the ATF retained the property as evidence in an ongoing
9 criminal proceeding. The Government then successfully moved to dismiss Lycurgan’s
10 Civil Asset Forfeiture Reform Act (CAFRA) complaint because the continued seizure
11 was necessary in light of the pending criminal investigation.

12 Recently, the ATF promised to unconditionally release all of Lycurgan’s seized
13 items because they are no longer needed in the criminal investigation. Despite the ATF’s
14 promise, the ATF failed to return 18 of the 5,804 seized unfinished polymer lower
15 receivers. The ATF has given no explanation for this withholding. Lycurgan seeks to
16 file a petition in this Court for the release of the 18 unfinished polymer lower receivers
17 unnecessarily withheld by the ATF.

18 **II. FACTUAL AND PROCEDURAL BACKGROUND**

19 **A. Company Background**

20 Dimitrios Karras ("Mr. Karras") is the Chief Executive Officer of Lycurgan, Inc.,
21 a California corporation d/b/a Ares Armor ("Lycurgan"). [McMillan Decl. ¶ 3.]
22 Lycurgan is a small retail business with four locations: three in Oceanside, California
23 and one in National City, California. [*Id.*] In addition, it operates a website
24 (www.aresarmor.com). [*Id.*]

25 Lycurgan sells gun parts, holsters, cases, apparel, and backpacks, and a product
26 known as an 80% AR-15 lower receiver. [*Id.*] An 80% lower is an industry term for an
27 unfinished receiver, which is not a firearm according to prior determinations from the

1 Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"). [*Id.*] Therefore, 80%
2 lowers do not require a federal firearms license and are not regulated under the Gun
3 Control Act of 1968. [*Id.*]

4 **B. Search and Seizure**

5 On March 15, 2014, numerous ATF agents swarmed Lycurgan's four leased real
6 estate properties located at: (1) 206/208 N. Freeman St., Oceanside, CA 92054; (2) 416
7 National City Blvd., Unit B, National City, CA; (3) 180 Roymar St., Suite D, Oceanside,
8 CA 92058; and (4) 2420 Industry, Suite A, Oceanside, CA. [McMillan Decl. ¶ 4.]
9 During its search, the ATF seized and carried away a large number of polymer castings,
10 among a multitude of other items that are necessary for the efficient functioning of the
11 business. [*Id.*]

12 **C. Civil Forfeiture**

13 On March 27, 2014, the ATF mailed a "NOTICE OF SEIZURE AND
14 ADMINISTRATIVE FORFEITURE PROCEEDING" to Lycurgan in an attempt to
15 withhold the seized items with an estimated value of \$574,596.00. [McMillan Decl. ¶ 5.]
16 The forfeiture notice provided: "The above-described property was seized by the Bureau
17 of Alcohol, Tobacco, Firearms and Explosives (ATF) for forfeiture pursuant to **Title 18,**
18 **United States Code (U.S.C.), Section 3051(c), 19 U.S.C., Sections 1602-1618, 28**
19 **C.F.R., Part 8, 18 U.S.C., Section 983 and/or 21 U.S.C., Section 881.**" [McMillan
20 Decl. ¶ 5.]

21 The forfeiture notice incorrectly described the seized items as "5,804 Unknown
22 Manufacturer AR Type Receiver/Frame CAL: Unknown SN: None." [*Id.*] Such items
23 are the property of Lycurgan in fee simple absolute. [*Id.*] And they are not "AR Type
24 Receiver/Frame." [*Id.*] The items are not "receivers" or "frames" as such words are
25 defined in the Gun Control Act of 1968, or prior interpretative determinations of the
26 ATF under such Act. [*Id.*] Rather, they are best known as "unfinished polymer lower
27 receivers."

1 On April 5, 2014, Lycurgan, through counsel, served a verified claim, contesting
2 the forfeiture and requesting the initiation of a judicial proceeding to challenge such
3 forfeiture. [McMillan Decl. ¶ 6.]

4 **D. The Government's Purported Dismissal of the Civil Forfeiture**

5 On June 11, 2014, Lycurgan filed a motion to unseal the search warrant affidavit.
6 [McMillan Decl. ¶ 7.] Lycurgan proffered several reasons why it needed to inspect the
7 affidavit. [*Id.*] Among the reasons was to enable Lycurgan to adequately challenge the
8 civil forfeiture. [*Id.*]

9 On July 3, 2014, the ATF voluntarily terminated the civil forfeiture proceeding,
10 but continued to retain the seized property as evidence in an ongoing criminal
11 investigation. [McMillan Decl. ¶ 8.] On July 10, 2014, the Government filed an
12 opposition to Lycurgan's motion to unseal, arguing that the withdrawal of the civil
13 forfeiture mooted the motion to unseal. [*Id.*]

14 **E. Lycurgan's CAFRA Complaint**

15 On July 16, 2014, Lycurgan filed the instant action under the Civil Asset
16 Forfeiture Reform Act ("CAFRA") because the Government's time to file a civil
17 forfeiture complaint lapsed pursuant to 18 U.S.C. section 983(a)(3)(A). [Compl. ¶ 15.]
18 Also, the Government has not obtained an indictment containing any allegation that the
19 property is subject to forfeiture. [Compl. ¶ 16.]

20 On September 22, 2014, the Government moved to dismiss the instant case on the
21 basis that the Government's withdrawal of the civil forfeiture deprived this Court of
22 subject matter jurisdiction. [McMillan Decl. ¶ 9.] On December 17, 2014, the Court
23 granted the Government's motion and dismissed the case. [*Id.*]

24 **F. The Government's Partial Release of Lycurgan's Seized Property**

25 On December 23, 2014, the ATF provided notice that "[t]he United States has
26 recently determined that the EP-80 lower firearm receivers seized [on March 15, 2014]
27 are no longer needed as evidence in its criminal investigation. Accordingly, it is

1 returning those firearms to Ares Armor.” [McMillan Decl. ¶ 10, Ex. A.] On December
2 23, 2014, Mr. Karras and his counsel met with the ATF agents who held Lycurgan’s
3 property. The ATF agents, Mr. Karras and Scott A. McMillan, Esq. spent the day
4 meticulously counting each one of Lycurgan’s released unfinished polymer lower
5 receivers, which amounted to a total of 5,786. [McMillan Decl. ¶ 10, Ex. B.] The ATF
6 retained 18 of Lycurgan’s unfinished polymer lower receivers without explanation. [*Id.*]

7 **III. LEGAL STANDARD FOR A MOTION FOR NEW TRIAL**

8 The district court is empowered to grant a new trial to all or any of the parties on
9 all or part of the issues, after either a jury or nonjury trial. (Fed. R. Civ. Proc. 59(a).)
10 Rule 59(a) does not specify the grounds on which the court may order a new trial. It
11 simply states that a new trial may be granted “after a nonjury trial, for any reason for
12 which a rehearing has heretofor been granted in a suit in equity in federal court.” (Fed.
13 R. Civ. Proc. 59(a)(1)(B).) Also, “[a]fter a nonjury trial, the court may, on motion for a
14 new trial, open the judgment if one has been entered, take additional testimony, amend
15 findings of fact and conclusions of law or make new ones, and direct the entry of a new
16 judgment.” (Fed. R. Civ. Proc. 59(a)(2).)

17 “A court may grant a new trial or amend its judgment after a court-tried action for
18 three reasons: (1) manifest error of law; (2) manifest error of fact; (3) newly-discovered
19 evidence.” (*Uganda Knapps v. City of Oakland* (N.D. Cal. 2009) 647 F.Supp.2d 1129,
20 1174, citing *Brown v. Wright* (9th Cir. 1978) 588 F.2d 708, 710; see also *Silver Sage*
21 *Partners, Ltd. v. City of Desert Hot Springs* (9th Cir. 2001) 251 F.3d 814, 819.) The
22 court has “wide discretion” to grant a new trial based on a combination of factors that
23 cause the court to conclude a new trial is necessary. (*Deas v. Paccar, Inc.* (11th Cir.
24 1985) 775 F.2d 1498, 1505.)

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1 **IV. ARGUMENT**

2 **A. The Newly Discovered Evidence that the ATF No Longer Needs to Retain**
3 **Lycurgan's Property in its Criminal Investigation Warrants a New Trial.**

4 The Court's order dismissing this action did not, and could not, consider the new
5 evidence that the ATF no longer needs to retain Lycurgan's property in its criminal
6 investigation. [McMillan Decl. ¶ 9.] The Court dismissed this case, holding that the
7 Government properly retained Lycurgan's property, despite the termination of the civil
8 forfeiture, because the property was needed as evidence in an ongoing criminal
9 investigation. [*Id.*] That is no longer the case. [McMillan Decl. ¶ 10, Ex. A.]
10 Therefore, the Court should grant a new trial or amend its judgment because this new
11 evidence was discovered after the judgment, it could not have been discovered earlier,
12 and the new evidence would have likely changed the outcome of the Court's order.
13 (Fed. R. Civ. Proc., rules 60(b) and 59(a); see *Dixon v. Wallowa County* (9th Cir. 2003)
14 336 F.3d 1013, 1022.)

15 **B. This Court Retains Jurisdiction in this Matter based on 18 U.S.C. section**
16 **983(f)(3)(A).**

17 The ATF released 5,786 unfinished polymer lower receivers, and withheld 18.
18 [McMillan Decl. ¶ 10, Ex. B.] Lycurgan requested the ATF to release the remaining 18
19 seized items in accordance with 18 U.S.C. section 983(f)(2). [McMillan Decl. ¶ 11, Ex.
20 D.] The ATF has not complied with this request. [*Id.*] Lycurgan's recourse is described
21 in section 983(f)(3), as follows:

22 (3) (A) If not later than 15 days after the date of a request under paragraph
23 (2) the property has not been released, ***the claimant may file a petition in***
24 ***the district court in which the complaint has been filed*** or, if no complaint
has been filed, in the district court in which the seizure warrant was issued
or in the district court for the district in which the property was seized.

25 (B) The petition described in subparagraph (A) shall set forth--

26 (i) the basis on which the requirements of paragraph (1) are met; and
(ii) the steps the claimant has taken to secure release of the property
from the appropriate official.

27 (*Id.*, emphasis added; *Wada v. United States Secret Service* (D.C. 2007) 525 F.Supp.2d
28

1, 12.) Accordingly, Lycurgan seeks to file a petition for the release of its property in this Court where Lycurgan filed its complaint under CAFRA. (See *id.*) This Court thus retains jurisdiction in this matter. (*Id.*)

C. Lycurgan’s Proposed Amended Complaint Contains the Newly Discovered Evidence and Pleads a Viable Cause of Action Under CAFRA.

When a plaintiff seeks leave to amend its complaint, “[t]he court should freely give leave when justice so requires.” (Fed. R. Civ. Proc. 15(a)(2).) “This policy is ‘to be applied with extreme liberality.’” (*Eminence Capital, LLC v. Aspeon, Inc.* (9th Cir. 2003) 316 F.3d 1048, 1051, quotation omitted.) Generally, leave to amend may be denied only if the opposing party makes a showing of undue prejudice, or bad faith or dilatory motive on the part of the moving party. (*Foman v. Davis* (1962) 371 U.S. 178, 182; *Martinez v. Newport Beach City* (9th Cir. 1997) 125 F.3d 777, 785, overruled on other grounds.)

In *Auster Oil & Gas, Inc. v. Stream* (5th Cir. 1985) 764 F.2d 381, 386, the plaintiff petitioned the district court to reconsider its order of dismissal and to allow amendment of the complaint based on newly discovered evidence. The district court denied the plaintiff’s motion to appeal. (*Id.* at 391.) The Court of Appeals held the district court abused its discretion because the new evidence supported the plaintiff’s claims. (*Id.* at 391-92.)

Lycurgan seeks to file an amended complaint to include the newly discovered evidence that the ATF admits it no longer has any reason to continue holding Lycurgan’s property.¹ [McMillan Decl. ¶ 10, Ex. C.] The proposed amended complaint also includes the allegation that the ATF released only 5,786 of the 5,804 seized unfinished polymer lower receivers, thereby improperly withholding 18 of the items. [*Id.*]

Lycurgan, as the “claimant,” is entitled to immediate release of its property remaining in

¹A separate formal motion for leave to amend is not always required. (*Edwards v. Occidental Chemical Corp.* (9th Cir. 1990) 892 F.2d 1442, 1445, n. 2.)

1 the Government's possession if:

- 2 (A) the claimant has a possessory interest in the property;
- 3 (B) the claimant has sufficient ties to the community to provide
assurance that the property will be available at the time of the trial;
- 4 (C) the continued possession by the Government pending the final
disposition of forfeiture proceedings will cause substantial hardship to the
claimant, such as preventing the functioning of a business, preventing an
5 individual from working, or leaving an individual homeless;
- 6 (D) the claimant's likely hardship from the continued possession by the
Government of the seized property outweighs the risk that the property will
be destroyed, damaged, lost, concealed, or transferred if it is returned to the
7 claimant during the pendency of the proceeding; and
- 8 (E) none of the conditions set forth in paragraph (8) applies.

9 (18 U.S.C. § 983(f)(1).) Paragraph (8) provides that the claimant is not entitled to
10 release of any property that:

- 11 (A) is contraband, currency, or other monetary instrument, or electronic
funds unless such currency or other monetary instrument or electronic funds
12 constitutes the assets of a legitimate business which has been seized;
- 13 (B) is to be used as evidence of a violation of the law;
- 14 (C) by reason of design or other characteristic, is particularly suited for
use in illegal activities; or
- 15 (D) is likely to be used to commit additional criminal acts if returned to
the claimant.

16 (18 U.S.C. § 983(f)(8).)

17 Lycurgan satisfies all of the aforementioned elements, which are sufficiently
plead in the attached proposed amended complaint. [McMillan Decl. ¶ 10, Ex. C.] In
18 summary: Lycurgan (A) owns the seized property, (B) has sufficient ties to the
19 community to provide assurance that the property will be available at the time of the
20 trial, (C) has been and will continue to suffer substantial hardship and financial loss if
21 the Government continues to retain its property, and (D) this hardship outweighs the risk
22 that the seized property will be lost because the Government has already had nearly a
23 year to examine the property, and lastly (E) the seized property is not contraband
24 according to the ATF's prior determinations, Lycurgan's retained expert witness who is
25 a former and longtime ATF agent, and supported by the ATF's release of Lycurgan's
26 5,786 unfinished polymer lower receivers.
27

1 **V. CONCLUSION**

2 Based on the foregoing reasons, Plaintiff Lycurgan, Inc. respectfully requests this
3 Court to grant its motion for new trial.

4
5 Respectfully submitted,
6 THE MCMILLAN LAW FIRM, APC
7 /s/ Michelle D. Volk

8 Dated: January 14, 2015

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10 _____
11 Michelle D. Volk
12 Attorneys for Petitioner/Movant
13 Lycurgan, Inc.
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